Supreme Court, U.S.
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No. 00-285

In the

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that the Takings Clause of the Fifth Amendment to the United States Constitution prescribes the following rule: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (footnote omitted).

The question presented is whether an owner has suffered a taking when he proves that a regulation deprives him of all economically beneficial use of his property without also proving that it frustrates his distinct or reasonable investment-backed expectations.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Pacific Legal Foundation attorneys have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 99-2047, 2000 U.S. LEXIS 6596 (Oct. 10, 2000), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation attorneys have represented two clients in two petitions for writ of certiorari in cases that involved analogous issues to the one at bar. *See Kim v. City of New York*, 681 N.E.2d 312 (N.Y.), *cert. denied*, 522 U.S. 1008 (1997); *City of Virginia Beach v. Bell*, 498 S.E.2d 414 (Va.), *cert. denied*, 119 S. Ct. 73 (1998). PLF has also filed amicus curiae briefs in support of petitioners in other cases that have been submitted to this Court with issues identical to the present ones. *See, e.g., Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999), and *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000). Because of the

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Sam McQueen bought two noncontiguous residential lots in 1961 and 1963. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), reproduced in Appellant's Appendix (AA) at 1a. Both lots are adjacent to manmade canals that were carved out to make a residential lagoon-style community. *See id.* at 1a-2a. In the early 1960's, the state had no restrictions against constructing bulkheads and filling such lots for residential development. *See McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 649 (S.C. Ct. App. 1998), reproduced in AA at 26a. Like many owners of undeveloped property, McQueen was in no immediate hurry to develop either lot. In 1977, the State adopted its Coastal Zone Management Act. 496 S.E.2d at 648-49, AA at 26a. That statute made it unlawful to develop properties such as McQueen's without applying for and receiving permits. *See* S.C. Code Ann. § 48-39-30(1), *et seq*. Nothing in the statute establishes time limitations for the development of real property affected by the new law. McQueen continued to bide his time. Finally, in 1991, he applied for permits to develop his property. AA at 2a. After various procedural steps not relevant to the present dispute, McQueen's applications and administrative appeals were ultimately denied in 1994. AA at 2a and 17a. He sued for a regulatory taking and prevailed in the Court of Appeals. AA at 29a. The South Carolina Coastal Council appealed.

Mirroring the facts in *Lucas*, the South Carolina Supreme Court began by holding unequivocally that "[i]t is uncontested

the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* at 4a. Yet the court found there had been no taking because of its curious take on the doctrine of investment-backed expectations.

The Court of Appeal found that McQueen had investment-backed expectations to develop the properties in the early 1960's when he purchased the property. AA at 26a (the ability to develop was an "expectation he clearly had when he purchased the lots over 30 years ago"). This finding was not contradicted by the South Carolina Supreme Court. But, according to the supreme court, these expectations apparently vanished. The court found that McQueen was not quick enough—he had waited too long to develop his property. He waited too long after he bought it (knowing that the Rivers and Harbors Act gave the federal government regulatory jurisdiction) and then he waited too long after the Coastal Zone Management Act was passed. AA at 13a. In the words of the South Carolina Supreme Court, "[h]is prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.* Thus, despite there being a total wipeout of "all economically viable use of his property," and despite the relegation, perhaps forever, of his property to its natural state, the court found that Sam McQueen's property has not been taken.

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

This Court has held on numerous occasions that if a regulation goes "too far" and destroys the economically beneficial and productive use of private property, then just compensation must be paid. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-16 (1992).

These holdings have not been met with universal acclaim. For example, a Washington State Supreme Court justice recently referred to this Court's opinion in *Lucas* as "superactive."[2]

Most lower federal and state court judges and justices are, of course, more circumspect. Their reluctance to trench upon the prerogatives of the regulatory state is manifested by attempts to distinguish, distort, and evade the key holdings of this Court, rather than the more visceral attack employed by Justice Talmadge. And, of course, not all lower courts react the same way. Rather than resist, some have embraced this Court's holdings that limit government's ability to destroy the use and value of private property through regulation without the payment of just compensation. But in many instances, the lower courts are all too willing to acquiesce to assertions of unchecked regulatory power over private property. The means by which the courts most frequently affirm government's power to take without compensation is by redefining the nature of the property. After all, if the property does not exist, how could it be taken?

The court below suggests that McQueen lost his investment-backed expectations because he did not try to develop quickly enough. This loss of expectations, in turn, results in a loss of the right to develop the property. Thus, the fundamental right to put property to economically beneficial and productive use has been transformed into a privilege with exceedingly short deadlines established by the state and the court. As will be shown, such a cavalier redefinition of background principles of property is inconsistent with the holdings of this and other courts. Indeed, as will be discussed

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[2] The justice continued by citing with favor a description of that opinion's author as a "judicial imperialist." Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 858 (2000).

below, conflicts now abound in the state and federal courts over the degree to which regulations can alter fundamental understandings of private property. Review by this Court is the only means to fix this doctrinal malady.

II

PROPERTY RIGHTS DO NOT DEVOLVE TO THE GOVERNMENT MERELY BECAUSE TIME PASSES AFTER A REGULATION IS ADOPTED

Underlying the decision of the South Carolina court is the thesis that property is a highly mutable concept. Under this theory, the background principles of property transform with time. Initially, an owner has the right to put the property to an economically beneficial and productive use. But after a regulation is adopted, the right to utilize property in a way that is affected by the regulation gradually diminishes with each passing day until the right at last disappears altogether. In other words, the longer one waits to develop property after a regulation is adopted, the less of a property right to develop remains.[3]

Here, for example, the restriction derives from the adoption in 1977 of the Coastal Zone Management Act. The Act did not directly remove development rights from the property owner—but the statute made those rights subject to a permitting requirement. The imposition of a permitting requirement by itself is not a taking and it would be pointless for an owner to bring an inverse condemnation claim just because he is now required to obtain a permit. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

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[3] According to this conceptual framework, the diminishment of property can also be accelerated when a regulated property is sold to a third party. *See, e.g., City of Virginia Beach v. Bell*, 498 S.E.2d 414; *Kim v. City of New York*, 681 N.E.2d 312.

Many, if not most, owners of undeveloped property do not intend to develop their land immediately. Personal reasons and market conditions may militate that an owner not develop an undeveloped parcel for years, or even generations, after it is first purchased. And until recent decisions such as *McQueen* came around, the property right itself was not altered merely by the delay. If an owner had a right to put property to economically beneficial and productive use ***before*** a regulation was adopted, the owner had similar rights ***after*** a regulation was adopted, albeit a right burdened by new permitting requirements. An owner could recover just compensation if the owner could prove in a timely facial or as-applied challenge that a regulatory taking had occurred.

But according to the court below, this is no longer true. The longer an owner waits to put property to use after a regulation is adopted, the less of a property right there is to defend. The court below couched this result in terms of Mr. McQueen's "investment-backed expectations," suggesting that those expectations disappeared because of McQueen's delay in development. That analysis is lacking. If McQueen had a legitimate expectation to develop his property prior to 1977, but not in 1991 when he applied for permits, then where did his expectations go and precisely when did they go? The court surely is not suggesting that his expectations disappeared the moment the statute was adopted in 1977. The idea that all expectations and rights disappear immediately after the regulation was adopted would preclude all regulatory takings challenges the moment a statute or regulation is adopted. That, of course, is not the law. *See Riverside Bayview Homes*, 474 U.S. at 127. So did McQueen's expectations and rights disappear one year later? Two years? Or perhaps just gradually, a little bit each year until there was nothing left in 1991? Such conclusions would be equally dissatisfying.

If, instead of focusing on the history of McQueen's expectations, one focuses on where the development rights have

gone, it is clear that they now belong to the government. Rights in property do not disappear into the air. They can be devised, sold, or stolen, but they do not evaporate. McQueen clearly no longer has a right to develop. There are no third parties with this right. There is no entity left other than the government that could possibly "own" the development rights. One would think McQueen is entitled to some sort of compensation. After all, the taking of his development rights has deprived McQueen of ***all*** economically beneficial and productive use of the property. AA at 4a.

But since a takings claim does not ripen until a permit application has been applied for and denied, and since McQueen had no "expectations" by the time he applied for his permits, the right to recover takings damages has disappeared before the case has even ripened! Mr. McQueen's alleged lack of "investment-backed expectations" is simply the court's creative ***mechanism*** that describes how McQueen has lost his development rights. But the ***result*** of the court's decision is a rule that interests in property are transferred merely through the passage of time after a regulation is adopted. The "bundle of sticks" that make up property is split into pieces: those interests that are restricted by the regulation devolve to the government with the passage of time. The owner keeps whatever is left. This alteration of the property, of course, may not be apparent until permit applications are denied and a court rules that the owner lacks investment-backed expectations because he did not attempt to develop quickly enough. In the end, the government will have obtained the development rights for free.

What exactly does this imply? Simply that anyone owning property today has no right to bring a regulatory takings claim over the application of whatever regulations have been in existence for a few or more years. The idea that property rights are fundamental liberties inherently owned by individuals must perish; rights in property must instead be viewed as mere trifles

or licenses, given by the government to the people at the discretion of the government.

Under this view, the old notion that property is an individually owned right disappears with the adoption of regulations. As soon as a regulation is adopted, or at least as soon as a few years pass, the right to use the property in a way that is subject to the new regulation will be owned by the government. Sometimes, the government may grant a permit application, thereby giving an "owner" the "vested right" or, more accurately, the "benefit" or "privilege" to develop property; other times, the government may deny permission. And because the government holds the development rights, and especially because the putative owner of the property should have known this and should have no contrary "expectations," there can be no complaint for just compensation.

The ruling below renders the Takings Clause of the Fifth Amendment nugatory. The debate is not new between those who have theorized that rights derive from the state and those who suggest that rights are inherently possessed by individuals. Nevertheless, the adoption of the former theory by an increasing number of courts in the context of environmental regulation should trouble this Court. The remainder of this brief will demonstrate that the theory of the South Carolina Supreme Court's opinion is contrary to the history and structure of the Constitution, the opinions of this Court, and the opinions of other lower courts.

A. The History and Structure of the Constitution Are Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

John Locke wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up

certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.
>
> The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.

John Locke, *Two Treatises of Government*, The Second Treatise §§ 123 and 124 (Peter Laslett ed., 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See, e.g.*, Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 Univ. of Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal Constitution).

The structure of the originally ratified Constitution was designed to protect property from, among other things, popular

agitation for "an abolition of debts, for an equal division of property, or for any other improper or wicked project." The Federalist No. 10 (James Madison) (Bantam ed., 1982). Later, the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed those development rights which the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption of a regulation followed by an indeterminate passage of time during which the owner does not seek to exercise his rapidly vanishing development rights.

Such a method for government acquisition of property is inconsistent with the Framers' vision of the relationship between property owners and their government. The Framers contemplated only one way by which the federal government could acquire private property against the will of the owner—through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27. Only this Court can restore the balance.

B. The Opinion of the South Carolina Court, That Government Can Acquire Development Rights in Property Merely by Adopting Regulations and Waiting for Regulation of That Land to Age, Is Contrary to Opinions of this Court

1. This Court Has Enforced Constitutional Limitations on the Ability of Governments to Take Property Without Compensation

In its early years, this Court came down strongly against uncompensated usurpations of private property by government. In *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court examined

Georgia's attempt to reacquire the title to millions of acres of land that had been purchased by good faith purchasers from others who had acquired the land from Georgia through corruption. Justice Marshall found the "act of transferring the property of an individual to the public" was both oppressive and a violation of the Contracts Clause. Georgia could not "pass[] a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." 10 U.S. at 139. In *Terrett v. Taylor*, 13 U.S. 43, 50-51 (1815), Justice Story wrote that Virginia's attempt to take property of the Episcopal Church was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property regally acquired."

Amicus submits that South Carolina cannot do indirectly what Georgia and Virginia could not do directly.

2. This Court Has Not Countenanced Government Defining Property Anew in Order to Take It; Events Occurring After a Regulation Is Adopted, Such as the Passage of Time or Sale of the Property, Do Not Redefine the Property

In more modern times, this Court has again returned to the understanding that government cannot alter the meaning of property in order to divest it from private owners. In *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist in the first place is no different from the court below holding that the development rights in McQueen's property vanished (or were divested to the state government) upon the mere passage of time following the adoption of regulations.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014, this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This implies the existence of principles that do not mysteriously change every time newly regulated property is not developed immediately after the adoption of a regulation.

Responding to an analogous syllogism, this Court made plain the fallacy of the South Carolina Supreme Court's logic in *Nollan v. California Coastal Commission*, 483 U.S. 825, where this Court wrote:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission *could not have deprived the prior owners of the easement without compensating them*, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2 (emphasis added). In this case, of course, we are not confronted with a landowner who purchased his land *after* the adoption of regulations, but with a landowner who acquired his land over a decade *before* the regulations were adopted. His only "mistake" was not establishing a record of "investment-backed expectations" by attempting to develop his property immediately after the purchase, or at least immediately after the adoption of the regulation.

The opinion of the court below strays from the principle that government cannot rewrite the definition of property in order to suit its own needs. In short, the adoption of a land-use or environmental regulation cannot destroy the right to use or develop property without compensation whether or not a landowner decides to exercise immediately that right to use or develop. This Court should grant certiorari in order to ensure that the lower courts no longer countenance the alteration of "background principles" through a post-regulatory passage of time.

3. The Doctrine of Investment-Backed Expectations Does Not Grant Government License to Take Riparian Property

The court below did not *overtly* say that it was redefining the nature of recently regulated property with every passing moment that an owner does not attempt to develop. As noted earlier, the court couched its holding in terms of Mr. McQueen's "reasonable investment-backed expectations." The concept of "investment-backed expectations" was first articulated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of distinct investment-backed expectations is one factor that a court may look to in determining whether there has been a regulatory taking.[4] This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Michelman cautions that expectations are not the exclusive way of defining property, for he later said that there

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[4] As noted in McQueen's petition, the relevance of this test where all economically visible use has been destroyed is questionable in light of this Court's holding in *Lucas*, 505 U.S. at 1016-17.

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman believes there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of riparian owners were protected ***despite*** expectations. *Id.* The Corps of Engineers could no more take Kaiser-Aetna's property without paying for it then South Carolina can take Sam McQueen's.

III

THERE IS A CONFLICT AMONG THE LOWER COURTS OVER THE DEGREE TO WHICH BACKGROUND PRINCIPLES OF PROPERTY LAW ARE AFFECTED BY EVENTS FOLLOWING THE ADOPTION OF REGULATIONS

As noted previously, this Court in *Lucas* said that courts must look first at "background principles" in order to determine what, if any, limitations exist on the development of real property that may obviate a finding of a regulatory taking. 505 U.S. at 1029.

A critical question, therefore, is whether the adoption of a regulation affects underlying "background principles." As one federal court wrote, the most important question in a regulatory takings inquiry is "what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?" *Reahard v. Lee County*, 968 F.2d 1131, 1336 (11th Cir. 1992). Although this Court in *Lucas* said that a limitation cannot be "newly legislated or decreed," the lower court in Mr. McQueen's case implicitly utilized the existence of the newly legislated Coastal Zone Management Act as a tool to undermine the existence of McQueen's "investment-backed expectations," which in turn serves to support the holding that McQueen did not have, or at least recently lost, the right to develop his property. In other words, the newly decreed legislation set in motion a change in the underlying property right of Mr. McQueen. Here, the change causes any development rights that are subject to the regulation to diminish incrementally in time after a regulation is adopted until, as here, they finally disappear altogether. The change is effected by the "failure to seek development permits in the face of ever more stringent regulations." AA at 13a.

Few courts have reached the question of how long a regulation must be in place, and how long a landowner can wait before seeking a development permit, before the regulation itself becomes a background principle capable of destroying investment-backed expectations and development rights.

A number of courts, however, have examined what happens when regulated property is transferred to a new owner. These courts are badly split. Some maintain that the background principles and development rights affected by the regulation remain intact and that they pass to the new owner. Others have found that the new owner does not acquire any development right that is subject to a preexisting regulation and that the new owner cannot maintain an inverse condemnation claim for the lost development rights. In such cases, the

background principles have been altered in that the development right has presumably passed to the government for free, much like what happened here from the passage of time.

Certainly, this is an issue of interest to this Court as demonstrated by the recent grant of a writ of certiorari in *Palazzolo*. There the Rhode Island Supreme Court denied a takings claim in part because the owner acquired the property (from a corporation in which he was the sole shareholder) after regulations were adopted. Likewise, several other states have adopted the rule that a sale to a third party after a regulation is enacted causes the transfer of the development right to the government. These states include New York, *see, e.g., Kim v. City of New York*, 681 N.E.2d 312; Virginia, *see City of Virginia Beach v. Bell*, 498 S.E.2d 414; Iowa, *see Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995); and New Hampshire, *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287 (N.H. 1984).[5]

But other states and the Ninth Circuit have rejected this rule. For example, New Jersey held in *Karam v. New Jersey, Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d

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[5] Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). Professor Eagle suggests that the right to bring an inverse condemnation claim must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes.

Id. at 368. In the case of *McQueen*, this warning can be expanded so that the "personal right has to be exercised *immediately after a regulation is adopted* . . . or else vanishes."

943 (N.J. 1999), that the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge. The Ninth Circuit in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), found that an as-applied takings challenge can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 118 S. Ct. 1359 (1999), the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In Florida, the court in *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *reh'g denied*, 613 So. 2d 3 (Fla. 1992), held that even though Vatalaro acquired property after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the state denied Vatalaro's permit application when the state determined her property was suitable only for limited passive recreational use. *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor."). Only this Court can resolve this conflict.

IV

THERE IS CONFLICT AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER A TAKINGS CLAIM FAILS DUE TO A LANDOWNER'S DELAY IN DEVELOPMENT ACTIVITIES

The South Carolina court found that McQueen's "failure to seek development permits in the face of ever more stringent regulations demonstrate[s] a distinct lack of investment-backed

expectations." AA at 13a. This logic is in conflict with a 1979 opinion by the California Supreme Court that found that a cause of action did not wane simply because a landowner waits to develop. In *Furey v. City of Sacramento*, 598 P.2d 844 (Cal.), *cert. denied and appeal dismissed sub nom. Webber v. City of Sacramento*, 444 U.S. 976 (1979), plaintiff landowners had their properties assessed for sewer infrastructure improvements in anticipation of the transition of the land from agriculture to urban development. However, eight years after they began to pay these substantial assessments, their land was rezoned to "open space." 598 P.2d at 846-47. Plaintiffs sued for inverse condemnation, among other causes of action. 598 P.2d at 848. In response to arguments that the landowners should not have waited to develop their property after the assessment was made, the California court held:

> Nor do we believe that plaintiffs' failure to develop their properties in the years intervening between the improvement and assessment and City's passage of its open-space limitation should be held to bar present complaint by them. . . . [There were allegations] to the effect that sound business decisions based upon housing demand and other relevant factors precluded development . . . .

Id. at 853.[6]

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[6] The idea that landowners should not be at a disadvantage because they bide their time to develop a property is also consistent with the holding of the many state courts that have modified or rejected the "coming to the nuisance" defense. *See, e.g., Weida v. Ferry*, 493 A.2d 824, 828 (R.I. 1985) ("The doctrine has been modified so that one's coming to the nuisance no longer acts as an absolute bar to recovering damages in a nuisance action. This modification came from a recognition that an absolute bar to a finding of nuisance would, in effect, give the offending activity a perpetual servitude upon the land of its neighbors without the payment of any

(continued...)

Similarly, Mr. McQueen's cause of action should not be held barred by his decision not to develop his lots when the Coastal Zone Management Act was adopted.

V

THERE IS A CONFLICT BETWEEN THE COURT BELOW AND THE FEDERAL CIRCUIT ON THE RELEVANCE OF CORPS JURISDICTION

The South Carolina court also ascribed importance to the fact that "[r]espondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899." AA at 13a. But the Federal Circuit has expressly rejected the invocation of the Rivers and Harbors Act as a means for the Corps to evade liability for a regulatory taking. In *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Corps denied a wetlands dredge and fill permit. When the landowner sued for inverse condemnation, the Corps argued that the landowner had no right to complain because the United States owns a superior "navigational servitude" over Palm Beach Isle's wetlands which it protects through the 1899 Act. However, the Federal Circuit held that the Corps could not avoid takings liability if the plaintiff's permit had been denied for *environmental* reasons, rather than out of a need to protect or improve *navigation*. *Id.* at 1385-86. The court did not find that the mere existence of the navigational servitude or the Rivers and Harbors Act of 1899 defeated the landowner's

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[6] (...continued)
compensation."); *Kellogg v. Viola*, 227 N.W.2d 55 (Wis. 1975); ("While coming to the nuisance may properly be considered while weighing the equities in an abatement action, it is irrelevant in a damage suit."); *Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I*, 445 S.E.2d 630 (S.C. 1994) (same). Here the "perpetual servitude" is the de facto acquisition of the development rights by the state.

"investment-backed expectations." *Id.* But here, the South Carolina Supreme Court opined that the mere existence of the Corps' unexercised regulatory jurisdiction pursuant to the Rivers and Harbors Act was enough to militate against finding a regulatory taking of McQueen's property. The opinions of the Federal Circuit and the South Carolina court are irreconcilable.

CONCLUSION

Sam McQueen lost all use and value of his property, and will not be compensated for that loss, because he did not attempt to develop his property immediately after the South Carolina Coastal Zone Management Act was adopted. This rule is contrary to the United States Constitution, opinions of this Court, and the holdings of other inferior tribunals. It represents, however, a trend that has been adopted in five states and that poses the most significant threat to well-established understandings of the place of property rights in this Nation. Just as this Court did in *Palazzolo*, it is respectfully submitted that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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